

2002

# The State of Utah v. Ronald K. Clark : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 v. :  
 :  
 RONALD K. CLARK, : Case No. 20020215-SC  
 :  
 Defendant/Appellant. :

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REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for **operation** of a clandestine laboratory, a first degree felony, in violation of Utah Code Ann. § 58-37d-4 (Supp. 2001); unlawful possession of a controlled/counterfeit substance with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (Supp. 2001); and use or possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable William W. Barrett, Judge, presiding.

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CLERK OF THE COURT

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## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| TABLE OF AUTHORITIES .....  | ii          |
| ARGUMENT  |             |
| LUND’S TRIAL PERFORMANCE FELL BELOW A REASONABLE<br>STANDARD OF PROFESSIONAL CARE. .... | 1           |
| CONCLUSION .....  | 4           |

## **TABLE OF AUTHORITIES**

### **Page**

### **CASES**

|   |         |
|---|---------|
| <u>State v. Bluff</u> , 2002 UT 66, 52 P.3d 1210 .....      | 1       |
| <u>State v. Templin</u> , 805 P.2d 182 (Utah 1990) .....    | 3, 4    |
| <u>Strickland v. Washington</u> , 466 U.S. 668 (1984) ..... | 1, 3, 4 |

### **STATUTES, RULES AND CONSTITUTIONAL PROVISIONS**

|  |         |
|--|---------|
| Utah Code Ann. § 58-37d-4 (Supp. 2001) ..... | 3       |
| Utah Code Ann. § 58-37d-5 (Supp. 2001) ..... | 3       |
| Utah Rule of Evidence 701 (2003) .....       | 1, 2, 4 |
| Utah Rule of Evidence 702 (2003) .....       | 1, 2, 4 |
| Utah Rule of Evidence 704 (2003) .....       | 1, 2, 4 |
| U.S. Const. amend. VI .....                  | 1, 4    |

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
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 Plaintiff/Appellee, :  
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 v. :  
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 RONALD K. CLARK, : Case No. 20020215-CA  
 :  
 Defendant/Appellant. :

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**ARGUMENT**

**ISSUE: LUND'S TRIAL PERFORMANCE FELL BELOW A  
REASONABLE STANDARD OF PROFESSIONAL CARE.**

Contrary to the State's assertion in its opening brief, Randall Lund ("Lund"), trial counsel for Appellant Ronald K. Clark ("Clark"), did not perform up to reasonable standards of professional care as an attorney when he opted not to challenge Marilyn Milburn's ("Milburn") testimony under Utah Rules of Evidence 701 and 702 (2003), or Detective Alva Davis' ("Davis") testimony under Utah Rule of Evidence 704 . See United States Const. amend. VI (right to effective assistance of counsel); Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Bluff, 2002 UT 66, ¶29, 52 P.3d 1210; see also Clark's Opening Brief ("AB") at Points I & II (argument regarding Lund's ineffectiveness for failure to challenge Milburn's and Davis' testimony).

The State, in making its argument, does not address the merits of a challenge to Milburn's testimony under Rules 701 and 702, or Davis' testimony under Rule 704. See State's Brief ("SB") at P.15. However, as noted in Clark's Opening Brief, Points I & II,

their testimonies were not legally admissible under Rules 701, 702, and 704. Hence, Lund's decision falls below a reasonable standard of professional care to the extent that he failed to object to legally inadmissible evidence.

The State also avers that a portion of Milburn's testimony is not “relevant to defendant's claim on appeal.” See State's Brief (“SB”) at p.16. The State specifically refers to the elements of Milburn's testimony where she describes a round-bottomed flask containing shredded paper, Clark's surveillance system, a gun and a small bottom of mercury located in the shed. SB 16.

The State's claim in this regard is disingenuous. The specific reason that the State elicited this testimony from Milburn during its case in chief was to substantiate her conclusion that she observed a meth lab at Clark's house. Indeed, she kept referring back to her “meth lab training” as the reason why she felt the enumerated items were significant and indicative of a meth lab. R.284[67,74].

Further, the prosecutor used Milburn's testimony regarding the round-bottomed flask expressly in her closing argument to the jury that Clark was operating a meth lab. She stated:

[Y]ou can infer that [Clark] intended to engage in a clandestine laboratory if he possessed a glass reaction vessel . . . . Let's talk about . . . a glass reaction vessel. . . You heard Marilyn Milburn testify she saw a round-bottomed flask with some netting kind of stuff on it, hanging from the ceiling, and it had shredded money in it. You have taken a look at it. . . . As you can tell, it is kind of yellowish, too. It is not clear. You might wonder why that is. And I will submit to you that the reason is he has been cooking in [the flask]. And why is there paper in it? Actually, money is actually cloth. But dry it out. And the only thing between that

reaction vessel . . . and cooking another batch is getting the paper out of it. Easy to do. I bet you could do it back in the jury room if you wanted to.

R.286[486-87].

The prosecutor similarly referred to the weapons located on Clark's property, including the gun testified to by Milburn, as part of the state's case. The State was required to establish that Clark had a firearm to secure a first degree conviction for operating a meth lab. See Utah Code Ann. § 58-37d-5 (Supp. 2001). Otherwise, the offense of operating a meth lab is a second degree felony. See Utah Code Ann. § 58-37d-4 (Supp. 2001).

The State's argument that Lund's failure to challenge Milburn's or Davis' testimony was professionally reasonable relies on the assumption that Lund made his decisions based on sound trial strategy. SB 20-27; see also, State v. Templin, 805 P.2d 182, 186 (Utah 1990) (citing Strickland, 466 U.S. at 689) (noting that trial counsel has wide latitude in determining strategy of a case). Again, the State's argument is without merit.

The only way to defend Clark's case was to challenge any statement from the State's witnesses that what they observed was a meth lab rather than a vast and eclectic collection of stuff strewn all over Clark's property.

The State's case against Clark was purely circumstantial. It had no evidence that a lab was in operation or that a full lab was constructed on the property at the time that the officers searched Clark's property. In fact, all the State had as evidence were random



items that it *alleged* could be used for a meth lab in this case.

Hence, allowing Milburn and Davis to offer conclusory statements that they saw the speculative meth lab cuts directly against sound strategy and was professionally irresponsible under the circumstances. As noted in Clark's opening brief, Lund could have made his objections quickly and outside the presence of the jury so as not to draw undue attention to the evidence. AB 31,35,42. In addition, Lund had a professional duty to ensure that those statements stayed out since they were legally inadmissible under Rules 701, 702 and 704. See AB Points I & II (discussing how Rules 701, 702, and 704 prohibit the testimony in question). Consequently, Lund's failure to raise the necessary objections against the testimonies of Milburn and Davis cannot be excused as trial strategy, and his failure to make the objections constitutes ineffective assistance of counsel. See Templin, 805 P.2d at 186; Strickland, 466 U.S. at 687-88; U.S. Const. amend. VI.<sup>1</sup>


### **CONCLUSION**

In light of the foregoing, and for the reasons set forth in Clark's opening brief, Lund rendered prejudicial ineffective assistance of counsel in violation of Clark's rights under the Sixth Amendment to the United States Constitution. Consequently, Clark respectfully requests this Court to reverse his convictions and remand for a new trial.

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<sup>1</sup> The State also challenges that Lund's omissions prejudiced the outcome of Clark's trial. See SB Point C. Clark submits on his opening brief, Point III, in response to the State's argument.

RESPECTFULLY submitted this 18<sup>th</sup> day of June, 2003.

  
CATHERINE E. LILLY  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 18<sup>th</sup> day of June, 2003.

  
CATHERINE E. LILLY

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this \_\_\_ day of June, 2003.

\_\_\_\_\_